Supreme Court, U.S.
FILED
JAN 10 2000
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(2)

No. 99-994

IN THE

Supreme Court of the United States

SYSCO FOOD SERVICES OF SAN FRANCISCO, INC.,

Petitioner,

v.

BRENDA NORRIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a federal district court have authority to award attorney's fees to a plaintiff who is successful in her claim under the Americans with Disabilities Act (42 U.S.C. §§ 12101-12213) and on a "mixed motive" Title VII sex discrimination claim (42 U.S.C. § 2000e5(g), notwithstanding that the plaintiff failed to prevail on other theories and the district court expressed its dissatisfaction with the form of her requests for attorney's fees?

PARTIES TO THE PROCEEDING

All of the parties to this proceeding are set forth in the caption. The Petitioner Sysco Food Services of San Francisco, Inc. (formerly Allied-Sysco Food Services, Inc.), a California corporation ("Allied"), was the defendant below. The Respondent Brenda Norris was the plaintiff below.

The Petitioner is a wholly-owned subsidiary of Sysco Corporation, a publicly-held Delaware corporation having its principal place of business in Houston, Texas.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in *Norris v. Sysco Corp. and Allied-Sysco Food Services, Inc.*, Nos. 97-15447 and 97-16716, which is not yet published, is set forth in the Appendix A of the Petition for Writ of Certiorari. The opinion of the United States District Court in *Norris v. Sysco Corp. and Allied-Sysco Food Services, Inc.*, No. C94-0433 WDB, is set forth in Appendix B of the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this proceeding under 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C. § 1291. The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343.

STATUTORY PROVISIONS INVOLVED

The attorney's fee provision of the Americans with Disabilities Act, which is found at 42 U.S.C. § 12205, provides:

> In any action or administrative proceeding commenced pursuant to this Act, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

The attorney's fee provision applicable to "mixed motive" cases under Title VII of the Civil Rights Act of 1964 may be found in 42 U.S.C. § 2000e-5(g)(2)(B), which states:

> On a claim in which an individual proves a violation under section 703(m) [42 U.S.C. § 2000e-2(m)] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court--
>
> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m); and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

STATEMENT OF THE CASE

Procedural History

Brenda Norris, the Respondent in this proceeding, brought an action against her employer, Allied-Sysco Food Services, Inc. ("Allied"), claiming that she had suffered discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000c-2000e-15, and the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213.

On the Title VII claim, the jury found that Allied had discriminated against Ms. Norris by failing to promote her because she was a woman. The jury also determined, however, that Allied would not have promoted her even if it had no discriminatory motive.

On the ADA claim, the jury found that Allied had failed to offer any accommodation to Ms. Norris after she had sustained injuries on the job and outside work, as explained more fully below. The District Court then entered a judgment against Allied in the amount of $300,000. Dissatisfied with the form of Ms. Norris's requests for attorney's fees, the District Court determined that she was entitled to $247,840 in attorney's fees. The court also reduced her request for costs and expenses to $24,107.63 (App. 21a).

Allied appealed on the grounds that the District Court had erred in failing to grant it judgment as a matter of law or a new trial and erroneously granted attorney's fees to Ms. Norris (App. 21a). Affirming, the Ninth Circuit concluded

that the District Court had explained its methodology and reasons for making the adjustments in Ms. Norris's requests for attorney's fees and did not abuse its discretion in setting the fees (App. 21a).

Ms. Norris's former employer then filed this Petition for Writ of Certiorari.

Facts

Ms. Norris had been employed by Allied as a non-foods specialist. This traveling sales position required her to assist Allied's marketing associates in selling food-related supplies and equipment. Ms. Norris was required to drive long distances and occasionally to lift and move heavy objects. In the words of the Ninth Circuit, "[w]orking for Allied was never a picnic because the company did engage in practices that unlawfully discriminated against women" (App. 21a). The jury determined that Allied had discriminated against Ms. Norris by failing to promote her because she was a woman, a determination that was not questioned on appeal. The jury accepted Allied's mixed-motive defense, however, determining that Allied would have failed to promote her even if it had no discrimatory motive (App. 21).

Ms. Norris injured her back on the job in September, 1994. The next month she broke a knee in a fall that was not job-related. She underwent knee surgery in November, 1994, and back surgery in April, 1996. She left work on a disability leave in September, 1994. Ultimately, Ms. Norris and her physician maintained that Ms. Norris could have returned to work if some reasonable accommodation had

been offered to her by Allied. The jury agreed that Allied never did so and therefore was in violation of the ADA (App. 21a).

ARGUMENT -THE DISTRICT COURT PROPERLY AWARDED ATTORNEY'S FEES TO THE PLAINTIFF, WHO WAS SUCCESSFUL IN HER CLAIM UNDER THE AMERICANS WITH DISABILITIES ACT AND ON A "MIXED MOTIVE" TITLE VII SEX DISCRIMINATION CLAIM, NOTWITHSTANDING THAT THE PLAINTIFF DID NOT PREVAIL ON OTHER THEORIES AND THE COURT EXPRESSED ITS DISSATISFACTION WITH THE FORM OF HER REQUESTS FOR ATTORNEY'S FEES

The Petitioner takes the position in this case that the District Court improperly awarded Ms. Norris attorney's fees because she was not successful on all of her theories of action and because her attorney submitted insufficiently detailed records in support of her request for an award of attorney's fees. The Petitioner reads this Court's opinion in *Hensley v. Eckerhart,* 461 U.S. 424 (1983), as fully supporting its position. A close reading of *Hensley* reveals that this is not the case, and that the District Court did not stray from the guidelines set forth by this Court in *Henley.*

A. The *Hensley* Guidelines

Writing in the context of a civil rights action in which the successful party sought attorney's fees pursuant to 42 U.S.C. § 1988, this Court explained in *Hensley* that a plaintiff may

be considered a "prevailing party" (a term that appears only in the Americans with Disabilities Act provision cited above, but can be read into the Title VII attorney's fee provision cited) for purposes of attorney's fees if the plaintiff succeeds "on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." 461 U.S. at 433 (*quoting Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978). The Court stated that, in determining what fee is "reasonable," the district court should begin by

> determining the number of hours reasonably expended on the litigation multipled by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where the docuentation of hours is inadequate, the district court may reduce the award accordingly.

461 U.S. at 433.

Next, the district court should exclude from the initial fee calculation any hours that were not reasonably expended. The Court explained that "[c]ounsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary. . . ." 461 U.S. at 434. Contrary to the

Petitioner's assertion, *Hensley* does not mandate, or even suggest, that the district court refuse to award any attorney's fees to the prevailing party because of alleged excesses in billings by the successful attorney. Moreover, the Petitioner's wringing of hands at the many "person-hours" expended by the District Court in this case indicates a lack of understanding about the role of the district court in civil rights cases in which the prevailing party seeks an award of attorney's fees. One might as well decry the necessity of employing an umpire or a referee at an athletic event. *Hensley* and its progeny make it clear that the law contemplates that the district court will be called upon to determine the appropriateness of the request for attorney's fees.

Hensely identified additional factors that should be weighed by the district court in evaluating a request for an award of attorney's fees. A factor of paramount importance is the results obtained by the attorney for the prevailing party. This Court explained that this factor is particularly crucial when a plaintiff is deemed to be the prevailing party "even though he succeeded on only some of his claims for relief." The district court must consider two questions: whether the plaintiff failed to prevail on claims that were unrelated to the claims on which he succeeded, and whether the plaintiff achieved a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award. 461 U.S. at 434.

In a case such as this, when the plaintiff prevails on some theories but not on others, *Hensley* recognized that

> the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. . . . Again, the most critical factor is the degree of success obtained.

461 U.S. at 436. The application of this principle, said the Court

> is particularly important in complex civil rights litigation involving numerous challenges to institutional practices or conditions. This type of litigation is lengthy and demands many hours of lawyers' services. Although the plaintiff often may succeed in identifying some unlawful practices or conditions, the range of possible success is vast. That the plaintiff is a "prevailing party" therefore may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved.

Id.

As the Ninth Circuit recognized, the District Court followed to the letter the guidelines set forth in *Hensley*. It

reduced the award of attorney's fees to reflect the less-than-total victory achieved by Ms. Norris and her attorney. It eliminated fees that it regarded as excessive or redundant.

In addition, a close reading of the record in this case reveals that the claims on which Ms. Norris did not prevail were not unrelated to those on which she prevailed. She achieved a level of success that justified the District Court's use of the hours expended by her attorney as a basis for making a fee award. In view of the Petitioner's arguments in this matter, one must remember this Court's admonition in *Hensley* that

> [t]here is no precise rule or formula for making these determinations. The district court may identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment.

461 U.S. at 436-37.

Finally, this Court prospectively put to rest in *Hensley* the contretemps engendered by the Petitioner in this matter when it concluded:

> We reemphasize that the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the

> litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.

461 U.S. at 437. As explained in Part C., below, this language suggests that this Petition is fundamentally flawed and should be denied regardless of the District Court's actions with respect to Ms. Norris's request for attorney's fees.

B. The Position Taken by the Circuits

The Petitioner implicitly suggests that the Ninth Circuit has somehow lost its way and failed to follow its own precedent and that there is some split of authority among the Circuits concerning the manner in which a district court evaluates a request by a prevailing party for attorney's fees in a civil rights action.

The Petitioner cites the Ninth Circuit's opinion in *Gates v. Deukmejian*, 987 F.2d 1392, 1397 (1992), which in turn cites *Hensley*, in support of the proposition that the party who applies for an award of attorney's fees bears the burden of documenting the appropriate hours expended and must submit evidence in support of those hours worked. The District Court found, and the record establishes, that Ms. Norris's attorney shouldered this burden when he submitted detailed evidence of the multitude of hours he worked in pursuing justice for Ms. Norris in this difficult and complex case. That the Petitioner does not approve of the prevailing attorney's arithmetic or the manner in which he complied with the District Court's requests for a more detailed

breakdown of the hours he expended does not change this overriding fact: it is the district court, not the Petitioner, that has the authority and the duty to evaluate the successful party's request for attorney's fees and to reduce the amount of that request if it deems it excessive.

The Ninth Circuit in this case did not depart from its earlier rulings. For example, the court stated in *Gates*, while citing *Hensley* and other authorities, the following principle:

> The district court has a great deal of discretion in determining the reasonableness of the fee and, as a general rule, we defer to its determination, including its decision regarding the reasonableness of the hours claimed by the prevailing party. . . . Despite this general deference, the district court is required to articulate not only the reasons for its findings regarding the propriety of the hours claimed or for any adjustments it makes either to the prevailing party's claimed hours or to the lodestar.

The court interpreted *Hensley* as "requiring the district court to give at least some indication of how it arrived at the amount of compensable hours for which fees were awarded to allow for meaningful appellate review." The court emphasized that it does not require "an elaborately reasoned, calculated, or worded order. . . ." In fact, "a brief explanation of how the court arrived at its figures will do. . . ." *Id.*

The Ninth Circuit went so far in *Gates as* to point out that the district court, in cases where a voluminous fee

application is filed, is not required in exercising its billing judgment to set forth an hour-by-hour analysis of the fee request. *Id.* (*citing Jacobs v. Mancuso*, 825 F.2d 559, 562 (1st Cir. 1987); *In re "Agent Orange" Product Liability Litigation,* 818 F.2d 226, 237-38 (2d Cir. 1987) ("no item-by-item accounting of the hours disallowed is necessary or desirable"); *Ohio-Sealy Mattress Manufacturing Co. v. Sealy Inc.,* 776 F.2d 646, 657-58 (7th Cir. 1985)). The court went on to explain:

> When faced with a massive fee application, the district court has the authority to make across-the-board percentage cuts either in the number of hours claimed or in the final lodestar figure "as a practical means of trimming the fat from a fee application." *New York State Ass'n for Retarded Children v. Carey*, 711 F.2d 1136, 1146 (2d Cir. 1983); *Daggett v. Kimmelman*, 811 F.2d 793, 797-98 (3d Cir. 1987); *Tomazzoli v. Sheedy*, 804 F.2d 93, 97-98 (7th Cir. 1986); *Mares v. Credit Bureau of Raton*, 801 F.2d 1197, 1202-03 (10th Cir. 1986) (77% reduction in hours).

Id.

The Petitioner has not demonstrated any split of authority among the Circuits on the issue of attorney's fee awards. The cases cited above demonstrate that there is widespread agreement with the principles of *Hensley.* Any differences in the outcomes of the cases illustrate only that each case turns on its particular facts, which makes the Petitioner's

request for certiorari in this case all the more dubious, as explained below.

C. The Inappropriateness of Certiorari in This Type of Case

This Court has long recognized that its jurisdiction to review judgments and decrees of the courts of appeals must be exercised sparingly and only in cases of gravity and general importance, or to secure uniformity of decision. *See Re Lau Ow Bew,* 141 U.S. 583 (1891). Certiorari is granted only when the settlement of principles in a case is of importance to the public, as opposed to the parties involved. *See National Labor Relations Board v. Pittsburgh Steamship Co.,* 340 U.S. 498 (1951). Jurisdiction to bring up cases by writs of certiorari from the courts of appeal was conferred upon this Court for two purposes: to secure uniformity of decision between those courts and to bring up questions of importance that the public interest demands to have decided by the court of last resort. *See Magnum Import Co. v. Coty,* 262 U.S. 159 (1923).

Finally, this Court ordinarily will not grant certiorari to review judgments based solely on questions of fact. *See NLRB v. Waterman Steamship Corp.,* 309 U.S. 206 (1940). As noted above, this Court stated in *Hensley* that cases such as the one now under consideration involve what are essentially factual matters. Thus, certiorari is inappropriate here, regardless of the correctness of the District Court's actions in awarding attorney's fees to Ms. Norris.

CONCLUSION

The Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari for the reasons stated above.

Respectfully submitted,

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